

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
CTC Telcom, Inc.)	
)	
v.)	CSR 5833
)	
City of Rice Lake, Wisconsin)	
)	
Complaint to Resolve an Open Video System)	
Dispute Regarding Financial and In-Kind)	
Contributions Towards Public, Educational and)	
Governmental Access Services, Facilities and)	
Equipment)	

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 2002

Released: July 17, 2002

By the Chief, Media Bureau:

I. INTRODUCTION

1. CTC Telcom, Inc. ("CTC") filed a complaint¹ against the City of Rice Lake, Wisconsin (the "City" or "Rice Lake") to obtain clarification of the open video system² public, educational and governmental ("PEG") financial and in-kind contribution requirements of Section 76.1505(d) of the Commission's rules; and (2) obtain an order prohibiting the City from interpreting those contribution requirements in a manner that places CTC at a competitive disadvantage to Charter Communications, Inc. ("Charter"), the incumbent cable television operator serving Rice Lake. The City filed an Answer to the Complaint. Charter filed comments and the National Association of Telecommunications Officers and Advisors and the Alliance for Community Media jointly filed comments. CTC filed a Reply.

II. BACKGROUND

2. In the Telecommunications Act of 1996 ("1996 Act"), Congress set forth four means by which common carriers may enter the video programming marketplace: (1) radio-based systems; (2)

¹ CTC filed its complaint pursuant to the open video system complaint procedures of Section 76.1513 and, in the alternative, the Section 76.7 general complaint procedures. See 47 C.F.R. §§ 76.1513; 76.7. Because Section 76.1513 appears to contemplate only complaints against open video system operators, we will treat CTC's complaint as filed pursuant to Section 76.7.

² An open video system is defined as "[a] facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which included video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part." 47 C.F.R. § 76.1500(a).

common carriage of video traffic; (3) cable systems; and (4) open video systems.³ In rulemakings implementing open video system regulations,⁴ the Commission concluded that Congress did not intend to restrict open video system service to telephone companies alone, and permitted non-local exchange carriers and cable operators to operate open video systems and to obtain carriage on such systems where “consistent with the public interest, convenience, and necessity....”⁵ The Commission stated that the open video system model “can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice.”⁶ The United States Court of Appeals for the Fifth Circuit considered consolidated appeals of the Commission’s open video system rules – affirming in part, reversing in part, and remanding in part those rules.⁷

3. Although generally enjoying more streamlined regulation than operators of cable systems, open video system operators are subject to clearly defined obligations. One of these obligations is the requirement that open video systems satisfy PEG obligations that are no greater or lesser than the PEG obligations of cable operators.⁸

III. DISCUSSION

A. The Pleadings

4. CTC is a Wisconsin corporation that operates an open video system in Rice Lake,

³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 651, 110 Stat. 118-19 (1996); Communications Act § 651, 47 U.S.C. § 571.

⁴ *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 14639 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 18223 (1996) (“*Second Report and Order*”); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 6776 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 19081 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 11 FCC Rcd 20227 (1996) (“*Third Report and Order*”); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 12 FCC Rcd 6258 (1997); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 12 FCC Rcd 7545 (1997); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 13 FCC Rcd 14553 (1998).

⁵ *Second Report and Order*, 11 FCC Rcd at 18232, 18257-60.

⁶ *Id.* at 18227.

⁷ *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), *reh’g denied*, Nos. 96-60502, 96-60581 and 96-60844 (5th Cir. May 28, 1999) (“*City of Dallas*”). In *City of Dallas*, the Fifth Circuit affirmed the Commission’s rules: (i) relating to open video system fees paid to local franchise authorities (“LFAs”); (ii) prohibiting LFAs from requiring institutional networks; and (iii) limiting the ability of non-local exchange carrier cable operators and expired cable franchisees to become open video system operators. 165 F.3d at 360. The Fifth Circuit reversed the Commission’s rules: (i) prohibiting LFAs from requiring open video system operators to obtain franchises; (ii) requiring open video system operators to obtain certification prior to constructing new facilities; and (iii) prohibiting local exchange carriers who are also cable operators from providing open video system service in the absence of effective competition. *Id.* The Fifth Circuit remanded to the Commission for further consideration its rules granting discretion to open video system operators to permit competing, in-region cable operators to become open video system programming providers. *Id.* The Commission filed for rehearing before the Fifth Circuit contesting the court’s decision on the issue of LFA ability to require that open video systems obtain franchises. The Fifth Circuit denied all rehearing requests. The Commission resolved the reversed and remanded issues in a separate proceeding. See *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, 14 FCC Rcd 19700 (1999).

⁸ 47 U.S.C. § 573(c)(1)&(2).

Wisconsin.⁹ CTC is a wholly-owned subsidiary of Chibardun Telephone Cooperative, Inc., a Wisconsin corporation that maintains its principal office at the same location as CTC.¹⁰ CTC and Chibardun are small, regional telecommunications companies located in northwestern Wisconsin that together employ approximately 70 people.¹¹ As of November 1, 2001, CTC had 246 open video system subscribers in Rice Lake. Charter, the incumbent cable television operator in Rice Lake, had approximately 3,500 subscribers as of November 1, 2001.¹² CTC states that it initially planned to serve Rice Lake as a cable television operator. After encountering delays in the cable franchising process, CTC states that it decided to pursue the open video system option.¹³ CTC asserts that on June 16, 2000, it was granted certification by the Commission, pursuant to Section 76.1502 of the Commission's rules, to operate an open video system in Rice Lake.¹⁴

5. In preparing to launch its open video system service in Rice Lake, CTC states that it expended \$31,927.45 to connect its system to Charter's PEG access channel feed.¹⁵ CTC argues that pursuant to Section 76.1505(d)(4) it is permitted to count these connection costs as an offset against its matching financial contributions required by Section 76.1505. CTC states that the City's Cable Director requested that CTC spread the deductions over a period of years rather than deducting them from its initial capital grant payments.¹⁶ After CTC expressed its reluctance to spread out its Section 76.1505(d)(4) deduction, CTC states that the City's Cable Director informed it that Charter had made certain in-kind contributions during 2000 and notified CTC that it would be required to make an additional payment of \$28,528.98 in cash to match Charter's in-kind contributions.¹⁷ CTC asserts that this figure is extremely close to the \$31,927.45 connection expenditure that CTC had planned to offset against its capital grant obligations.¹⁸ CTC asserts that the Charter franchise contains no reference to origination points as in-kind contributions and that the City decided that the origination points were in-kind contributions only after CTC began crediting the costs it had incurred to connect to the PEG access channel feed to offset its capital grants, as permitted by Section 76.1505(d)(4) of the Commission's rules.¹⁹ CTC argues that it was given no prior notice of Charter's in-kind contributions, nor any opportunity to negotiate agreeable terms with Charter or the City regarding the need for, nature or valuation of in-kind contributions.²⁰ CTC also states that Charter's in-kind contributions were made, at

⁹ CTC Complaint at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 4.

¹³ *Id.* at 3.

¹⁴ *Id.* See *CTC Telcom Inc. Certification to Operate An Open Video System*, 15 FCC Rcd 10804 (CSB 2000). After receiving its open video system certification, CTC indicates that it was notified by Rice Lake's Cable Director by letter dated June 19, 2000, that CTC needed to obtain a cable television franchise from the City before providing open video system service in Rice Lake. CTC Complaint at 3. As a result, CTC states that it delayed commencing open video system service for several weeks. Thereafter in August, 2000, the City adopted an open video system Ordinance specifying that open video system operators would not need to obtain a cable television franchise before offering service in Rice Lake. *Id.* On September 1, 2000, CTC began providing open video system service. *Id.* at 4.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ CTC Reply at 10, 21.

²⁰ CTC Complaint at 5.

least in part, in years before CTC commenced its Rice Lake open video system operations.²¹

6. CTC states that the City's Cable Director indicated that CTC was expected to match the full amount of Charter's capital grant and any additional capital grants in succeeding years.²² Specifically, CTC asserts that the Cable Director demanded that CTC match Charter's capital grant of \$5,821.20 per year, plus an additional Charter capital grant of \$5,821.20 per year.²³ CTC argues that the capital grant demands are wholly discriminatory and will render it extremely difficult for CTC to offer effective competition to Charter in Rice Lake.²⁴ CTC also argues that the initial and second Charter capital grants were negotiated with Charter, and adopted by the City on the basis of per-subscriber formulas that were designed for ready pass-through to Charter subscribers on their monthly bills. CTC asserts that it cannot pass-through these amounts to subscribers without placing CTC at a major price disadvantage.²⁵ In addition, CTC argues that, although the City claims that Charter must meet its "Capital Grant Floor" payment requirement regardless of the number of subscribers it has, the Charter franchise permits waiver of the "Capital Grant Floor" if Charter loses a significant number of subscribers to a competitor.²⁶ CTC argues that Section 653(c)(2)(B) expressly provides that the rate at which franchise fees are imposed on the open video system operator shall not exceed the rate at which such fees are imposed on any cable operator in the franchise area.²⁷ CTC states that it is willing to pay the same per-subscriber capital grants and additional capital grants as Charter but cannot effectively compete with Charter in Rice Lake if it must pay exactly the same dollar amounts as Charter when CTC's subscriber base is significantly less than the size of Charter's subscriber base.²⁸

7. CTC argues that the City has disregarded its Section 76.1505(c) obligation to engage in bona fide negotiations with CTC regarding PEG financing, and has refused to consider the reasonable and equitable PEG financing arrangement proposed by CTC.²⁹ CTC states that it tried to settle the PEG financing dispute with the City by agreeing to comply with the City's demands that it match Charter's capital grant payments on a dollar-for-dollar basis during the present ten-year Charter franchise term.³⁰ CTC also notes that it proposed eliminating the balance of its connection credit by the offset of the Charter in-kind contribution.³¹ In return, CTC indicates that it asked the City to agree to not increase further the amounts of the Charter capital grants required to be matched by CTC; and not to accept additional in-kind contributions from Charter for which it would demand the payment of the monetary equivalent from CTC.³² CTC points out that on November 26, 2001, the City's Cable Commission

²¹ *Id.* at 7. Specifically, CTC alleges that the year 2000 in-kind contributions for which the City demands matching payments by CTC were made by Charter in August 1998, May 2000, and March 2001. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ CTC Reply at 7, 20.

²⁶ *Id.* at 8. The applicable language in Section 22a of the Charter franchise agreement states: The City shall waive the Capital Grant Floor requirement in the event a competitive franchise is awarded to another cable operator and the waiver is necessary to achieve equity between Charter and the other cable operator with regard to the capital grant payment.

²⁷ CTC Complaint at 9. *See* 47 U.S.C. § 573(c)(2)(B).

²⁸ CTC Complaint at 9.

²⁹ CTC Reply at 2.

³⁰ *Id.* at 24.

³¹ *Id.*

³² *Id.*

rejected the settlement proposed by CTC.³³ CTC states that instead of negotiation, the City has relied on the Section 76.1505(d) default mechanism, and has demanded that CTC match, on a dollar-for-dollar basis, the capital grants and in-kind contributions of Charter.³⁴ Moreover, CTC contends that the City's approach regarding negotiating PEG capital grants and in-kind PEG contributions with the incumbent cable operator and then imposing equal dollar obligations upon the small open video system provider clearly leads to the preclusion of open video system competitors.³⁵ CTC further argues that the City's claim that it can refuse to negotiate or consider anything other than imposing the same aggregate PEG financial obligations upon CTC as it negotiated with Charter will render the Section 653 open video system option dead for entities smaller than Regional Bell Operating Companies.³⁶

8. In its Answer, the City argues that CTC's request is contrary to Section 76.1505(d)(1) of the Commission's rules.³⁷ The City points out that Section 76.1501(d)(1) provides that the open video system operator must satisfy the same PEG access obligations as the local cable operator by matching the local cable operator's annual financial contributions towards PEG access services, facilities and equipment.³⁸ Rice Lake indicates that the Charter and Rice Lake Franchise Agreement establishes certain floor amounts that Charter must pay to Rice Lake regardless of the number of subscribers Charter has and that CTC must match the capital grant floor amounts to comply with the Commission's rules and its statutory PEG access obligations.³⁹ Rice Lake asserts that CTC representatives knew of, and participated in, the negotiations that led to the Charter Franchise Agreement and were specifically aware of the capital grant requirements.⁴⁰ Regarding in-kind contributions, the City asserts that Section 76.1505(d)(1) sets forth a default mechanism that requires the open video system operator to pay the franchise authority the monetary equivalent of the local cable operator's depreciated in-kind contribution.⁴¹ Rice Lake states that it established that the depreciated value of Charter's in-kind contribution (*i.e.* the cost to establish the four origination points so that live programming could be aired from each point) was \$28,528.98 and that CTC is required to pay the monetary equivalent of this amount.⁴² However in this case, Rice Lake notes that instead of insisting on cash payments it granted CTC's request and allowed CTC to deduct the depreciated value of a digitizer CTC installed for PEG access purposes.⁴³ Rice Lake asserts that it has in

³³ *Id.* at 25.

³⁴ *Id.* at 2, 16. CTC states that in the *Second Report and Order*, 11 FCC Rcd at 18298, and *Third Report and Order*, 11 FCC Rcd at 20282, the Commission emphasized that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant franchising authority and incorporated this determination regarding the primacy and preferred status of negotiation into Section 76.1505(c) of the Rules. CTC notes that the matching requirement in Section 76.1505(d)(1) of the rules is plainly labeled a default mechanism.

³⁵ CTC Reply at 3.

³⁶ *Id.* at 4.

³⁷ Rice Lake Answer at 3.

³⁸ *Id.* at 4; 47 C.F.R. § 76.1505(d)(1).

³⁹ Rice Lake Answer at 4.

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 5.

⁴² *Id.*

⁴³ *Id.* Rice Lake indicates that during a September 18, 2000, Cable Commission meeting CTC claimed \$28,339.85 as the amount appropriate to deduct from its obligation to make monetary equivalent payments under Rice Lake's open video system ordinance and 47 C.F.R. § 76.1505(d). Thereafter, by letter dated June 26, 2001, sent to Rice Lake's Cable Director, CTC stated that its costs for installing the digitizer totaled \$31,927.45. In its reply, CTC indicates that the discrepancy in the calculation of connection costs was due to the fact that CTC did not initially realize that it should include its labor costs as well as its equipment costs in the final calculation. The City's Cable

(continued....)

good faith spent many months trying to negotiate the requirements with CTC even though Rice Lake was not required to do so.⁴⁴

9. The National Association of Telecommunications Officers and The Alliance for Community Media filed joint comments opposing the complaint filed by CTC against Rice Lake.⁴⁵ These parties argue that the Commission has squarely rejected the position that CTC is advancing and reiterate that the open video system operators' obligation is to match, rather than share, the annual PEG access financial contributions of the local cable operator.⁴⁶ In its comments, Charter asserts that for PEG support contributions open video system operators are required, absent an agreement with the local franchising authority, to satisfy the same financial PEG access obligations as the local cable operator.⁴⁷ Similarly, regarding in-kind equipment grants, Charter asserts that the Commission stated that precise duplication of equipment would be inappropriate, so the open video system operator will, at a minimum, be required to pay the local franchising authority the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value.⁴⁸ Charter indicates that the Commission already has addressed CTC's request by rejecting the idea of sharing support based on the number of subscribers and adopted the requirement that, in the absence of a negotiated agreement, the cable operator's burden be met exactly.⁴⁹

B. Analysis

10. Section 653(c)(1)(B) of the Communications Act provides that any PEG requirement that applies to cable operators under Section 611 shall apply to open video system operators.⁵⁰ Generally, Section 611 permits a local cable franchising authority to require that a cable operator designate channel capacity for public, educational, and governmental use.⁵¹ Under this statutory provision, a franchising authority may require, as part of a local cable franchise, or as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for PEG use, and that capacity on institutional networks can be designated for educational or governmental use.⁵² The franchising authority is allowed to mandate and enforce franchise requirements for services, facilities, or equipment related to PEG use of channel capacity.⁵³ In adopting rules to implement open video system PEG requirements, Congress instructed the Commission to "impose obligations that are no greater or lesser than the obligations. . . ."

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Commission approved CTC's inclusion of these labor costs and revised the figure to \$31,927.45. Rice Lake Answer at 11 and CTC Reply at 22.

⁴⁴ Rice Lake Answer at 38.

⁴⁵ NATOA is a professional association made up of individual and organizations responsible for – or advising those responsible for cable and telecommunications policies and services in local governments throughout the United States. The Alliance is a national educational and advocacy organization working in support of public, educational and government access.

⁴⁶ Joint Comments at 2.

⁴⁷ Charter Comments at 2.

⁴⁸ *Id.* at 3, citing *Third Report and Order*, 11 FCC Rcd at 20283 (1996).

⁴⁹ *Id.*

⁵⁰ 47 U.S.C. § 573 (c)(1)(B).

⁵¹ 47 U.S.C. § 531.

⁵² 47 U.S.C. § 531(b).

⁵³ 47 U.S.C. § 531(c).

imposed upon cable operators.⁵⁴

11. Open video system operators should, in the first instance, be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator.⁵⁵ Indeed, negotiated solutions regarding an open video system's PEG obligations can lead to the most equitable and pro-competitive result, particularly where there is a pronounced difference between the size of the incumbent cable operator and the open video system operator. For example, local jurisdictions might place an inordinate burden on new entrants, thereby discouraging competitive entry, if they simply were to require open video system operators to match the contribution of the incumbent dominant cable operator in every case. Nonetheless, where negotiations fail, our rules are clear – the open video system operator must match any contributions made by the incumbent cable operator.⁵⁶ As the Commission stated in the *Third Report and Order*:

We believe that imposing Section 611 [PEG] obligations on open video system operators so that to the extent possible the obligations are “no greater or lesser” than those imposed on cable operators means that, in the absence of an agreement with the local franchising authority, an open video system operator must match, rather than share, the annual PEG access financial contributions of the local cable operator Our modified rule will apply the matching principle which we have applied to channel capacity also to PEG contributions that cable operators make, and that are actually used for PEG access services, facilities and equipment. For instance, if a cable operator makes an annual contribution of \$15,000 that is used to purchase PEG access equipment, the open video system operator will now be required to do likewise.⁵⁷

For in-kind contributions, such as cameras and production studios, precise duplication is unnecessary and open video system operators may work out mutually agreeable terms with cable operators so that PEG service to the community is improved and the open video system operator fulfills its statutory obligation.⁵⁸ In the absence of such agreement, however, the Commission determined that an open video system operator should pay the local franchising authority the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value.⁵⁹ In addition, the Commission concluded that the costs associated with the open video system operator's connection to the cable operator's PEG access channel feed shall be borne by the open video system operator and that such costs would be counted toward the open video system operator's matching obligation.⁶⁰

12. Although CTC disputes the sincerity of Rice Lake's PEG negotiations, it is apparent that the parties negotiated CTC's PEG obligations to impasse. In such instances, the default mechanism of Section 76.1505(d)(1) requires the open video system operator to match the annual PEG access financial contribution of the local cable operator.⁶¹ Accordingly, CTC is required to match the annual PEG

⁵⁴ 47 U.S.C. § 573(c)(2)(A).

⁵⁵ *Third Report and Order*, 11 FCC Rcd at 20282.

⁵⁶ 47 C.F.R. § 76.1505(d)(1).

⁵⁷ *Third Report and Order*, 11 FCC Rcd at 20282.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See 47 C.F.R. § 76.1505(d)(1).

contributions of Charter. With regard to any in-kind contribution, CTC is required to pay the local franchising authority the monetary equivalent of Charter's depreciated in-kind contribution.⁶² With regard to the CTC costs of connection to Charter's PEG channel feed, Section 76.1505(d)(4) provides that such costs shall be counted towards the open video system operator's matching financial contributions.⁶³ The City has indicated that it will allow CTC to deduct the depreciated value of a digitizer CTC installed for PEG access purposes.

13. With regard to CTC's per-subscriber capital grant contribution argument, we note that, although such amount is calculated on a per-subscriber basis, there is a "Capital Grant Floor" provision in the Charter franchise that establishes a minimum amount that Charter must pay regardless of the number of subscribers that Charter serves. It is this floor amount that Rice Lake appears to require CTC to match. This requirement is consistent with Section 76.1505(d)(1).⁶⁴ CTC further argues that, under certain conditions, the "Capital Grant Floor" can be waived by Rice Lake. To the extent necessary, we clarify that should the floor amount be waived in whole or part by Rice Lake, CTC's obligation would be to match Charter's revised capital grant obligation. If waived in its entirety, CTC's obligation would likewise be eliminated.

14. Finally, CTC alleges that Rice Lake requires CTC to match in-kind contributions made by Charter before CTC served Rice Lake. Section 76.1505(d)(1) provides that, in the absence of a negotiated agreement regarding PEG obligations, "an open video system must satisfy the same [PEG] obligations as the local cable operator by . . . matching the local cable operator's *annual* financial contributions towards [PEG] services, facilities and equipment *that are actually used* for [PEG] services, facilities and equipment."⁶⁵ We clarify that any matching PEG contributions requested by Rice Lake that are attributable to Charter contributions made in years prior to the year in which CTC commenced service are not consistent with Section 76.1505(d)(1) and are precluded. Further CTC is required only to match Charter PEG contributions, either cash or in-kind, that actually are used to provide PEG services.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** CTC Telcom, Inc.'s Open Video System Complaint against the City of Rice Lake, Wisconsin **IS GRANTED** to the extent indicated herein and in all other respects **DENIED**.

16. This action is taken pursuant to authority delegated under § 0.283 of the Commission's rules, as amended.⁶⁶

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

⁶² *Id.*

⁶³ See 47 C.F.R. § 76.1505(d)(4).

⁶⁴ Of course, the City and CTC are free to negotiate the capital grant amount to be paid by CTC. For example, applying the per-subscriber amount paid by Charter to the number of subscribers that CTC actually serves.

⁶⁵ 47 C.F.R. § 76.1505(d)(1) (emphasis added).

⁶⁶ 47 C.F.R. § 0.283.